IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 24684 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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CHAUDHARY NANJIBHAI NATHUBHAI - Petitioner(s)
Versus
CHAUDHARY RUGANTHBHAI MOTIBHAI & 6 - Respondent(s)

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Appearance :
MR PRAKASH K JANI for the Petitioner.
MR PANKAJ K SONI for Respondent no.1.
Mr. Siraj Gori, Assistant GOVERNMENT PLEADER for Respondent nos. 2 and 3.
MR KEYUR A VYAS for Respondent nos. 4 to 7.

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CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 02/03/2006

ORAL JUDGMENT

The present petition has been preferred under Article 227 of the Constitution of India, against the

order dated 18th November,2005/2nd December, 2005 passed by the respondent no. 2 (Annexure “T” to the memo of the petition).

2. The learned advocate for the petitioner vehemently submitted that the impugned order dated 18th November, 2005 passed by the respondent no. 2 is patently erroneous, bad in law and dehors the facts and it has not considered previous several orders passed by various authorities, and, therefore, it deserves to be quashed and set aside. He has also pointed out that the encroachment made by respondent no. 1 is on a public road which was objected to time and again by the petitioner and others and despite these objections, Dhinoj Gram Panchayat passed a resolution dated 18th November, 1998 whereby encroachment on public road was regularised (Annexure “F”). Against this resolution, an appeal was preferred by the petitioner under section 242 of the Gujarat Panchayats Act, 1993 before Mahesana District Panchayat appellate committee. After hearing the petitioner as well as respondent no. 1, the resolution dated 18th November, 1998 was quashed and set aside and it was directed that the encroachment was made on road by the respondent no. 1.. This order was passed on 10th/20th May, 2002 (Annexure “M” to the memo of the

petition) and a direction was given by the Appellate Committee of Patan District Panchayat that the encroachment ought to be removed by the encroachers. Against this orders, a Revision Application was preferred by the respondent no. 1 under section 259 of the Act of 1993 before Joint Secretary (Inquiry), Panchayat and Rural Housing and Rural Development Department, State of Gujarat, who, after hearing the parties, passed the order dated 31st March, 2003 (Annexure “Q” to the memo of the petition), whereby the Revision Application preferred by respondent no.1 was dismissed and the order dated 20th May, 2002 passed by the Patan District was confirmed and it was also directed by the Joint Secretary, while passing the final order on Revision that the encroacher, i.e. Respondent no. 1 ought to remove the encroachment. It is also submitted by the learned advocate for the petitioner that this order has not been challenged so far by respondent no.1 and has accepted the said order. There are consistent findings of facts by both the authorities below, namely District Appellate Committee as well as by the Joint Secretary. In the final order of appeal as well as in Revision, a direction was given to the effect that the encroachment in question is on road, therefore, is not regularisable and, hence, regularisation done by

Dhinoj Gram Panchayat vide resolution dated 18th November, 1988 is quashed and set aside and encroachment was ordered to be removed. This order has been accepted by respondent no.1. No appeal, or petition has ever been preferred against the order passed by the Joint Secretary in Revision Application under section 259 of the Act of 1993. It is also submitted by the learned advocate for the petitioner that time and again, parallally, other applications have been preferred by respondent no.1 before District Collector for regularisation and always his requests have been rejected by the concerned Collector at different intervals of time. Initially, it was dismissed on 24th January, 2000 (Annexure “I” to the memo of the petition). Second time, request for regularisation was not accepted by the Collector vide order dated 3rd June, 2000 (Annexure “J” to the memo of the petition) and third time, application for regularisation was not accepted by the Collector, Patan vide order dated 19th January, 2002 (Annexure “L” to the memo of the petition). Even Collectors have observed in all the aforesaid orders that the encroachment by respondent no.1 is on road and if the encroachment is regularised, the width of the public road will be reduced. This shrinkage of public road has not been accepted by the

Collectors time and again and even by the appellate committee and even by revisional authority vide their respective orders under Panchayat Act, 1993. But the respondent no.1 preferred a Revision Application against the order of the Collector dated 19th January, 2002 in the form of Revision Application no. 3 of 2002 under section 211 of the Bombay Land Revenue Code before respondent no. 2 and the respondent no. 2 has passed the impugned order dated 18th November, 2005 (Annexure “T” to the memo of the petition), whereby factually incorrect observations have been made in the impugned order. The learned advocate for the petitioner vehemently submitted that there was no scope for the Joint Secretary (Appeals) while passing the impugned order dated 18th November, 2005 to arrive at a conclusion as to facts that the encroached land is not reducing width of the road, in the face of the earlier orders passed by the appellate committee dated 20th May, 2002 and the order dated 31st March,2003 passed by the Joint Secretary, in Revision Application and two other orders dated 24th January,2000 and 3rd June,2000. In all these four orders, there is a consistent finding of fact that the encroachment is on the road and therefore, in the impugned order, observation made by the respondent no. 2 that the encroachment is not on road and is not causing

any hindrance to others is de hors the facts. The so called opinion of the Deputy Collector, Patan is also without application of mind. The Deputy Collector, Patan has no authority to arrive at a conclusion that the encroachment is not on road, especially when the earlier order is passed by the Secretary (Appeals) in the Revision Application decided on 31st March,2003. The Deputy Collector, Patan cannot sit in appeal against the order dated 31st March, 2005 passed by the Joint Secretary (Annexure “Q” to the memo of the petition). Such type of opinion and such type of impugned order dated 18th November,2005 gives unnecessary way/stepping stone to the respondent no.1 for getting the unauthorised construction regularised which is on road. The remand order passed by the Deputy Secretary therefore, deserves to be quashed and set aside. In fact, no other conclusion ought to have been arrived at than what was arrived at in the earlier order dated 31st March,2003. The earlier orders have not been appreciated at all by the Joint Secretary, while passing the impugned order. In fact, the facts have already been settled and now, they cannot be upset by the impugned order and hence the impugned order deserves to be quashed and set aside.

3. I have also heard the learned advocate for the respondent no.1 who has submitted that the impugned order is true, correct, legal and in consonance with facts and law, more so when the Joint Secretary has passed the order of remand for a fresh decision by the Collector, Patan. No final conclusion has been arrived at by the Joint Secretary in his impugned order dated 18th November, 2005 and therefore, there is no cause of action for the petitioner to challenge this order. Nothing has been decided against the petitioner by the impugned order. On the contrary, a fresh decision has to be arrived at by the Collector, Patan. The observations in the impugned orders are tentative in nature, but the final order has to be passed by the Collector, after hearing the petitioner as well as the respondent no.1. Therefore, the petition deserves to be quashed and set aside. Earlier the orders dated 24th January, 2000 and 3rd June, 2000 are non-speaking orders and no reasons have been assigned in those two earlier orders and therefore, it is rightly appreciated by the Joint Secretary in the impugned order that the matters are required to be remanded to the Collector, Patan.

4. I have also heard the learned Assistant Government Pleader for respondent nos. 2 and 3 who has

submitted that on an earlier occasion, an appeal was preferred before District Appellate Committee of the District Panchayat under section 242 of the Act of 1993 and thereafter, Revision Application was preferred under section 259 of the Act of 1993 and orders were passed in favour of the petitioner, stating therein that the encroachment is on the public road and is not regularisable and therefore, a direction was given to the encroacher, that is, respondent no.1 to remove the same. While passing the impugned order, diagonally opposite or contrary observation has been made in the impugned order that the encroachment is not causing any hindrance to anyone nor it reduces the width of the road. Thus, the factual aspect of the matter has been changed in the impugned order. Nonetheless, there is a remand of the matter and therefore, a fresh order can be passed by the Collector, Patan.

5. Having heard the learned counsel for the rival parties and looking to the facts and circumstances of the case, I am of the opinion that the impugned order dated 18th November, 2005 (Annexure “T” to the memo of the petition) passed by the respondent no. 2 in Revision Application no. 3 of 2002 under section 211 of the Bombay Land Revenue Code, requires to be quashed and set

aside for the following facts and reasons:-

(i) The respondent no.1 preferred an application for regularisation of the construction before Dhinoj Gram Panchayat which passed a resolution dated 18th November, 1998, whereby the encroachment was regularised. (Annexure “F” to the memo of the petition). Thereafter, this resolution was challenged by the petitioner by way of an appeal before appellate committee of the District Panchayat under section 242 of the Panchayats Act,1993 and the appellate committee, after hearing both the sides, vide its order dated 20th May, 2002 (Annexure “M” to the memo of the petition) quashed and set aside the resolution passed by Dhinoj Gram Panchayat dated 18th November,1998 and the encroachment was ordered to be removed with a clear observation therein that the encroachment is on public road. If the regularisation is allowed, it reduces the width of the road and therefore, such encroachment cannot be regularised. This order passed by the appellate committee of

District Panchayat was challenged by respondent no.1 by way of preferring a Revision Application under section 259 of the Act, before Joint Secretary, who after hearing both the sides at length, (vide order at Annexure “Q” to the memo of the petition) dismissed the Revision Application with detailed observations as to the nature of encroachment, especially to the effect that the same is on road and if it is regularised, it reduces the width of the road and therefore, the order passed by the the appellate committee of the District Panchayat, Patan was confirmed and the encroachment was ordered to be removed. This order and the earlier order of the District Panchayat appellate committee have the same finding of fact as to the nature of the encroachment which is on the road. These observations and orders have attained their finality. No petition has been preferred against this order, neither any stay has been obtained from any competent authority or competent court. Therefore, the impugned order cannot travel beyond this consistent findings of fact.

(ii) Time and again the present respondent no.1 has preferred applications before the concerned authority for regularisation and the Collector, Patan has, initially vide order dated 24th January, 2000, not accepted request of the respondent no.1 observing that the encroachment is on road and therefore, not regularisable. Thereafter, the order dated 3rd January, 2000 was also passed that the encroachment is on the road and therefore, not regularisable. Both these orders are at Annexure “I” and “J” to the memo of the petition. Third time, an application was preferred by respondent no.1 and again it was dismissed by the District Collector, Patan vide order dated 19th January, 2002 (Annexure “L” to the memo of the petition). Again there was an observation that the encroachment is on the road and therefore, the width of the road has been reduced and therefore, the application for regularisation was not accepted. Thus, there are four orders with the consistent findings of facts:- (a) By the appellate

committee of the District Panchayat, dated 10th/20th May,2002 (Annexure “M”) (b) By the Joint Secretary dated 31st March,2003 (Annexure “Q”) (c) By the Collector dated 24th January,2000 (Annexure “I”) (d) By the Collector dated 3rd June,2000 (Annexure “J”) and lastly by the Collector vide his order dated 19th January,2002. This order is challenged by way of Revision Application no. 3 of 2002 by the respondent no.1 under section 211 of the Bombay Land Revenue Code, wherein, on the basis of some report (which is never supplied to the petitioner) given by the Deputy Collector, Patan, there are observations in the impugned order that the encroachment made by respondent no.1 is not reducing the width of the road. This surreptitious observation is dehors the settled facts, which is based upon the Deputy Collector's report. It has been lost sight of, while passing the impugned order that the facts have been settled by the appellate committee as well as by Revisional Authority by separate orders (Annexures “M” and “Q”). The order dated 31st March, 2003

passed by the Joint Secretary has attained its finality and therefore, any observation in the impugned order which upsets the settled facts deserves to be quashed and set aside. The observations in the impugned order and the conclusion arrived at in the impugned order are absolutely dehors the facts and law. If there is any encroachment on a public road, the same cannot be regularised. The public roads are meant for usage by public. The encroachment of any nature on public road ought to have been removed no sooner did earlier two directions, have been received. However, for one or the other reasons, such encroachment has not been removed. The Joint Secretary passed an order dated 31st March, 2003 in Revision Application no. 3 of 2002 for removal of encroachment. For the reasons best known to the concerned authority, namely Dhinoj Gram Panchayat, the encroachment has not been removed. It is a misfortune for the persons, who are residing in the vicinity of the area of encroachment, that the same has not been removed by the concerned authorities.

6. Looking to the aforesaid facts and circumstances and various orders, the observations made in the impugned orders are factually incorrect and legally not tenable and, therefore, as a cumulative effect of all the aforesaid reasons, the impugned order requires to be quashed and set aside. Accordingly, the impugned order dated 18th November, 2005 passed by the Joint Secretary (Appeals), Revenue Department, State of Gujarat, Ahmedabad passed in Revision Application no. 3 of 2002 is hereby quashed and set aside. Consequently, the respondent no. 3 Collector, Patan is hereby directed to remove the encroachment made by the respondent no.1 as early as possible and practicable and without any further loss of time. Rule made absolute accordingly with no order as to costs. Direct service permitted.

7. At this stage, the learned advocate for respondent no.1 prays for stay of this order for a period of two weeks to approach the higher forum. The learned advocate for the petitioner has vehemently objected to this request. The learned Assistant Government Pleader has also objected to this prayer. Looking to the facts and circumstances of the case and the observations made hereinabove, the request made by

the learned advocate for the petitioner is not accepted by this Court.

(D.N.Patel,J)

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